

STATE OF MICHIGAN
COURT OF APPEALS

ERIC A. BRAVERMAN, Successor Personal
Representative of the Estate of PATRICIA
SWANN, Deceased,

Plaintiff-Appellee,

v

GARDEN CITY HOSPITAL, a/k/a GARDEN
CITY HOSPITAL, OSTEOPATHIC,

Defendant-Appellee,

and

JOHN R. SCHAIRER, D.O., GARY
YASHINSKY, M.D., ABHINAV RAINA, M.D.,
and PROVIDENCE HOSPITAL AND MEDICAL
CENTERS, INC.,

Defendants-Appellants.

ERIC A. BRAVERMAN, Successor Personal
Representative of the Estate of PATRICIA
SWANN, Deceased,

Plaintiff-Appellee,

v

GARDEN CITY HOSPITAL, a/k/a GARDEN
CITY HOSPITAL, OSTEOPATHIC,

Defendant-Appellant,

and

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August 15, 2006
9:05 a.m.

No. 264029
Wayne Circuit Court
LC No. 05-502345-NH

No. 264091
Wayne Circuit Court
LC No. 05-502345-NH

Official Reported Version

JOHN R. SCHAIRER, D.O., GARY
YASHINSKY, M.D., ABHINAV RAINA, M.D.,
and PROVIDENCE HOSPITAL AND MEDICAL
CENTERS, INC.,

Defendants.

Before: Jansen, P.J., and Neff and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. Contrary to the majority, I find that the notice of intent to sue ("notice") issue is not properly preserved for interlocutory review. I conclude that the majority is reaching to declare a conflict where the outcome of this case need not be determined by resolution of a conflict panel. I would not declare a conflict with *Verbrugghe v Select Specialty Hosp-Macomb County, Inc*, 270 Mich App 383; 715 NW2d 72 (2006), because *Verbrugghe* applied MCL 600.2912b under *Halton v Fawcett*, 259 Mich App 699; 675 NW2d 880 (2003), not under MCL 700.3701. Accordingly, I would affirm the trial court's decision denying defendants summary disposition. On remand, I would urge the trial court to consider the issue whether MCL 700.3701 modifies the meaning of "person," as defined by *Halton*, under MCL 600.2912b(1).

This Court may disregard the issue preservation requirements where refusal to consider the issue results in manifest injustice. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005). I am not persuaded here that to avoid manifest injustice this Court need consider the notice issue.¹ There is no evidence that the trial court considered this issue; indeed, Providence and Yashinsky only raised the issue in response to plaintiff's reply to a motion for summary disposition, claiming that, "[a]lternatively, if [the trial court] should find that the appointment of a successor personal representative renders this action timely, it must be

¹Indeed, not only did Garden City fail to raise the notice issue before the trial court in its motion for summary disposition, Garden City also did not present this issue in its application for leave to appeal. MCR 7.205(D)(4). Thus, in regard to Docket No. 264091, the requirements for preserving the notice issue have clearly not been satisfied in this case.

Furthermore, the notice issue was only raised in defendants Providence's and Yashinsky's reply to plaintiff's response to their motion for summary disposition. While the record shows that some defendants concurred in other defendants' motions for summary disposition, the record does not show that any defendant concurred in Providence's and Yashinsky's motion for summary disposition. Thus, the issue is only arguably preserved with respect to Providence and Yashinsky, although they only raised the notice issue as an alternative argument that would be presented if the trial court found the action timely.

dismissed without prejudice because Mr. Braverman has not sent a notice of intent." Although the trial court found the action timely, there is no indication that the trial court would err in deciding whether the case must be dismissed without prejudice where plaintiff himself did not file a notice.

A medical malpractice plaintiff must file a notice of intent to sue before commencing his or her action in the trial court. Specifically, MCL 600.2912b(1) provides:

Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [MCL 600.2912b(1).]

In *Halton, supra*, the plaintiff served the defendants with the requisite notice of intent. She was later appointed personal representative and filed suit in that capacity. *Id.* at 700-701. *Halton* noted that "the statute requires that *the* person commencing a medical malpractice action be the person who previously served a notice of intent on the defendant." *Id.* at 702 (emphasis in original). After consulting the dictionary, *Halton* concluded that "the word 'person' refers to a human being, whether in their individual or representative capacity." *Id.* at 704. *Halton*, therefore, held that because the plaintiff who filed suit was the same human being who served the notice of intent, albeit in a different capacity, "the statutory requirement that the person who files the suit must have previously given notice of intent is satisfied." *Id.*

The majority claims that *Verbrugghe* "does not comport with the provisions of [the Estate and Protected Individuals Code (EPIC)] that generally permits a personal representative to ratify acts by another that are beneficial to the estate. MCL 700.3701." *Ante* at _____. In *Verbrugghe*, the initial personal representative filed a notice of intent to sue and later filed suit. The defendants moved for summary disposition on the basis that the suit was untimely. Before the summary disposition hearing, however, letters of authority were issued to the successor personal representative. *Id.* at 386. The successor personal representative filed a second suit, and "specifically elected not to ratify the lawsuit brought by the initial personal representative." *Id.* at 392. Applying MCL 600.2912b(1) and *Halton's* definition of "person" under that provision, *Verbrugghe* held that the "plaintiff herself was required to file or serve a notice of intent before commencing this lawsuit." *Id.* at 397. As noted by the majority, *ante* at _____, "*Verbrugghe* might be read as holding that no notice of intent was filed as a prerequisite to the second lawsuit since the first notice of intent clearly pertained to the previously filed, first lawsuit."

Verbrugghe did not address MCL 600.2912b(1) in conjunction with MCL 700.3701, and thus did not consider whether an initial personal representative is the same "person" as a successor personal representative under MCL 600.2912b(1). *Verbrugghe* did, however, address *Halton*. Under *Halton*, "the word 'person' refers to a human being, whether in their individual or representative capacity." *Halton* did not define "person" to include human beings that have the same representative capacities. This issue was never developed in the lower court and has not yet been addressed by this Court. In sum, neither the lower court nor this Court in *Verbrugghe* addressed whether, in light of EPIC, the "person" must be the same human being who filed a

notice of intent. I would affirm the decision of the trial court and remand for further proceedings and development of this significant issue of law.

/s/ Brian K. Zahra